ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2003-2

Ms. "K", Applicant v. International Monetary Fund, Respondent

Introduction

1. On September 29 and 30, 2003, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "K", a former staff member of the Fund.

2. Ms. "K" contests the decision of the Administration Committee of the Staff Retirement Plan ("SRP" or "Plan") denying her application for disability retirement. The Administration Committee concluded that Ms. "K" had failed to establish, as required by the terms of the Plan, that she is totally and permanently incapacitated for any duty that the Fund might reasonably ask her to perform.

3. Applicant contends that this decision is in error, that the Administration Committee improperly interpreted and applied the standard for disability retirement, and that the decision was tainted by procedural irregularity. Respondent for its part maintains that Applicant has not established any factual or legal basis for overturning the Committee's decision, which correctly applied the standard for disability retirement and was taken in accordance with fair and reasonable procedures.

The Procedure

4. On August 15, 2002, Ms. "K" filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Registrar advised Applicant that her Application did not fulfill the requirements of para. 3 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiencies. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.[1]

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[1] Rule VII provides in pertinent part:

"*Applications*

...

3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall

(continued)

5. The Application was transmitted to Respondent on September 5, 2002. On September 9, 2002, pursuant to Rule XIV, para. 4,[2] the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Ms. "K"'s Application on October 21, 2002.

6. Applicant submitted her Reply on November 25, 2002. The Fund's Rejoinder was filed on December 27, 2002.

7. Article XII of the Tribunal's Statute provides that the Tribunal shall "... decide in each case whether oral proceedings are warranted." Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held "... if the Tribunal decides that such proceedings are necessary for the disposition of the case." Neither party in this case requested oral proceedings and the Tribunal did not find them to be required.

The Legal Framework

8. Before reviewing the facts of the case of Ms. "K", the legal framework within which these facts arise may be recalled, in particular the pertinent provisions of the Staff Retirement Plan. In addition, although the administrative act contested by Ms. "K" in the Administrative Tribunal is the decision of the SRP Administration Committee denying her application for disability retirement, the requirements of the Fund's internal law relating to the separation of staff for medical reasons are reviewed as well, as they are referenced in the factual elements of the case and in the contentions of the parties.

Disability Retirement under the IMF Staff Retirement Plan

9. Disability retirement from the IMF is governed by Section 4.3 of the Staff Retirement Plan. SRP Section 4.3(a) sets forth the criteria for granting a request for a disability pension:

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include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof.

…

6. If the application does not fulfill the requirements established in Paragraphs 1 through 4 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time, not less than fifteen days, in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date. …"

[2] Rule XIV, para. 4 provides:

"4. In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund."

"**4.3 Disability Retirement**

(a) A participant in contributory service shall be retired on a disability pension before his normal retirement date on the first day of a calendar month not less than 30 nor more than 120 days immediately following receipt by the Administration Committee of written application therefor by the participant or the Employer; on the condition that the Pension Committee must find, on the recommendation of the Administration Committee and the certification of a physician or physicians designated by the Administration Committee, that:

(i) such participant, while in contributory service, became totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform;

(ii) such incapacity is likely to be permanent; and

(iii) such participant should be retired."

The formula for calculation of the disability pension is given as follows:

"(b) A disability pension shall become effective upon retirement and shall be equal to the normal pension that would be payable to the participant if his normal retirement date had fallen on the date of his disability retirement, but using for such computation his highest average remuneration and eligible service at the time of his disability retirement. In no event, however, shall such pension be less than the smaller of:

(i) 50 percent of such highest average gross remuneration; or

(ii) the normal pension that the participant would have received if he had remained a participant until his normal retirement date without change in such highest average remuneration."

10. Sections 4.3(c), (d) and (e) provide for the possibility of periodic medical examination of the retired participant and for the discontinuance or reduction of the disability pension based on a finding that the incapacity has wholly or partially ceased:

"(c) The Administration Committee may require a retired participant who is receiving a disability pension and who has not

reached his normal retirement date to be medically examined from time to time, not more often than once a year, by a physician or physicians designated by the Administration Committee. Such examination shall be made at the home of such retired participant, unless some other place shall be agreed upon by him and the Administration Committee. If such a retired participant shall fail to permit such an examination to be made, his disability pension may be discontinued by the Administration Committee until he shall permit such examination to be made and, in the discretion of the Administration Committee, if he shall fail to permit such examination to be made within a period of one year from the mailing or other sending to him, at his address as it appears on the records of the Administration Committee, of request therefor by the Administration Committee, his incapacity may be deemed to have wholly ceased, and he may be deemed to have withdrawn from the Plan as of the date when his disability pension was discontinued, with the eligible service accrued to the date of his disability retirement.

(d) If the Administration Committee shall find, as a result of a medical examination or on the basis of other satisfactory evidence, that the incapacity of a retired participant (who has not reached his normal retirement date), on account of which he is receiving a disability pension, has wholly ceased or that he has regained the earning capacity which he had before such incapacity, his disability pension shall cease, and if the Committee shall find that such incapacity has partly ceased for the performance of any work which he might reasonably be required to do, and that his earning capacity (in any such work) has been partially regained, his disability pension shall be reduced by the Administration Committee in a reasonable amount. If the disability pension is so discontinued or reduced and the retired participant shall again become incapacitated exclusively through and because of the same incapacity, his disability pension shall be restored upon the same conditions that applied to the original pension and the granting thereof, subject, however, to the provisions of subsection (e) of this Section 4.3.

(e) If a disability pension is discontinued pursuant to subsection (c) or (d) of this Section 4.3 and shall not be restored pursuant to subsection (d) of this Section 4.3 within a period of five years from such discontinuance, and if such retired participant shall not within such period again become a participant, he shall be deemed to have withdrawn from the Plan as of the date his disability pension was discontinued, with the eligible service

> accrued to the date of his disability retirement, and he shall be entitled to the benefits provided in Section 4.2 or Section 4.5(a), (b), or (c), whichever is applicable."

Finally, Section 4.3(f) defines "normal retirement date" for purposes of disability retirement:

> "(f) For purposes of this Section 4.3, normal retirement date shall mean the first day of the calendar month next following the 65th anniversary of his date of birth, or the date of such anniversary if it shall fall on the first day of a calendar month."

Separation of a Staff Member for Medical Disability

11. Separation of a staff member in the case of medical disability – as distinguished from according such staff member a disability pension - is provided for by GAO No. 13, Rev. 5 (June 15, 1989) at Annex I. Separation may be either at the staff member's initiative or at the Fund's initiative. Section 1 provides for separation at the staff member's initiative as follows:

> *"Section 1. Separation at the Staff Member's Initiative*
>
> 1.01 A staff member may request that he be separated from the Fund on grounds of medical disability. He shall address the request to the Director of Administration [now the Director of Human Resources] in writing. The staff member must be ready to present medical evidence in support of his request and must also be willing to undergo any examinations which the Fund's medical advisors deem necessary."

12. Section 2 provides for separation at the Fund's initiative. In the case of a staff member in sick leave status, such separation may be effected if "... on the basis of medical advice the Director of Administration has formed the opinion that the staff member will not be able to return to duty in the foreseeable future." (Section 2.01.1.) Separation at the Fund's initiative may also take place when

> "... over a prolonged period the staff member has been prevented, for medical reasons, from performing the duties assigned to him in an acceptable manner, and if another position suitable for the staff member is not found in accordance with the provisions of GAO No. 11 (Salary Administration), the Director of Administration shall seek the advice of the Fund's Health Services Department on the prospects for improvement within a reasonable period of time. If, on the basis of this advice, the Director of Administration forms

> the opinion that the staff member should be separated for medical reasons, the procedures outlined below shall be initiated."[3]

(Section 2.01.2.)

13. Section 2.02 sets forth the procedures to be followed in case of separation for medical reasons at the Fund's initiative, including notification to the staff member of the right to object to the proposed separation:

> "2.02.1 When the Director of Administration has reached the opinion that a staff member should be separated for medical reasons, he shall communicate this opinion to the staff member in writing, stating the reasons for his opinion and specifying the last date by which any objection on the part of the staff member must be received by the Fund."

Under Section 2.02.2, if no objection is notified to the Fund, the procedures of GAO No. 16 take effect. (See below.) In the case in which the staff member does file an objection to the proposed medical separation, an opinion is to be rendered by a panel of medical experts (one designated by the Administration, one by the staff member and the third selected by the other two) as to the staff member's condition in the context of the work demands placed on him. (Section 2.03.) Pursuant to Section 2.03.4, "[n]ormally, the panel shall examine the staff member personally." The Director of Administration thereafter decides on the basis of the medical opinion rendered by the panel of experts whether there are sufficient grounds for medical separation. (Section 2.04.1.)

14. Finally, GAO No. 13, Annex I, Section 2.04.2 describes the interplay among GAO No. 13, GAO No. 16 and SRP Section 4.3 as follows:

> "2.04.2 If the Director of Administration decides that the staff member should be separated for medical reasons, the procedures in

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[3] The referenced provisions of GAO No. 11, Rev. 3 (January 14, 1999) state:

> "6.04 *Performance Impeded for Medical or Other Personal Reasons*. If it is determined that, for medical or other personal reasons beyond his or her control, the staff member is unable to perform in full the duties of his or her position, and if no other vacant position is available at the same grade with duties that the staff member could reasonably be expected to perform, a staff member may, as an alternative to separation, be assigned to a vacant position at a lower grade where the staff member could be expected to perform the duties in full. Such an assignment will be subject to such special terms and conditions relating to the tenure of the position as the Managing Director or the Director of Administration, as appropriate, may decide after consultation with the Head of the relevant department.
>
> 6.04.1 The determination that a staff member is unable to perform the duties of his or her position shall be made in accordance with the provisions of Annex I to General Administrative Order No. 13, Rev. 5."

> GAO No. 16 shall be followed. In the case of participants in the Staff Retirement Plan, this will also include a determination of eligibility for a disability pension."

Accordingly, GAO No. 16, Rev. 5 (July 10, 1990), Section 11 describes the procedures effective "[i]n case of permanent incapacity, when a determination has been made in accordance with the provisions of Annex I to General Administrative Order No. 13 that a staff member shall be separated for medical reasons. ..." It is noted that the terms of GAO No. 16, Section 11.02 require that separation of a staff member who is a participant in the SRP shall not be implemented until a determination has been made under the Plan as to whether or not the participant will receive a disability pension. In the circumstance that the staff member separated for medical reasons does not receive a disability pension, Section 11.04 provides that he will be automatically granted a separation payment from the Separation Benefits Fund.[4]

The Factual Background of the Case

History of Employment

15. Ms. "K", who served the Fund in the capacity of a Staff Assistant, was first hired on a contractual basis in 1985 and became a member of the staff in December 1986. Beginning in 1993, Ms. "K" experienced a series of illnesses resulting in intermittent absences and periods of extended sick leave. In August 1999, Applicant began a period of extended sick leave (at full pay) as a result of the condition for which she now seeks disability retirement.

16. Ms. "K"'s period of extended sick leave expired March 30, 2000. On April 1, 2000, she was placed on administrative leave with pay pending the outcome of her disability

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[4] Such payment is calculated as follows:

> "4.06 Payments Under the Separation Benefits Fund. Whenever, under this Order, a staff member is entitled to a payment on separation from the Separation Benefits Fund (separation for medical reasons without access to a disability pension, abolition of position, reduction in strength, or change in job requirements), the payment shall be in an amount equivalent to one and one-fourth months' salary for each year of service, subject to a maximum that is the smaller of:
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> (a) the equivalent of 22-1/2 months' salary; and
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> (b) the amount of salary that would otherwise have been payable to the staff member between the last day on duty and his mandatory retirement age of 65.
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> The salary rate used for calculating the payment shall be the salary the staff member is receiving on the last day on duty; [footnote omitted] and length of service shall be computed to the nearest full month served."

retirement application (filed December 20, 1999). Following the SRP Administration Committee's decision of March 14, 2001 denying the disability retirement application, Ms. "K" was separated from the Fund pursuant to the procedures provided in GAO No. 16, Rev. 5. As a result of the length of her service, Ms. "K" received the maximum 22_ months separation benefit, which expired June 7, 2003.

Applicant's Request for Disability Retirement and Report by Medical Advisor

17. On December 20, 1999, Ms. "K" filed with the Administration Committee of the Staff Retirement Plan a Request for disability retirement.

18. On January 26, 2001, the Medical Advisor to the SRP Administration Committee delivered his report on Ms. "K"'s condition. The Medical Advisor reviewed Ms. "K"'s medical history, which included treatment and surgeries for breast cancer, as well as "depressive episodes resulting in suicide attempts." He noted that she has been diagnosed with "borderline personality" but had not undergone psychotherapy of "sufficient intensity and frequency" to treat the condition. He also observed that "[w]orking at the IMF has heightened her feeling of vulnerability, which due to her personality structure [has] been transformed into persecutory feelings." In the Medical Advisor's view, "[a]lthough she has the cognitive capacity to work at a job similar to the one she performed at the IMF, she lacks the motivation to seek to return to work with the IMF or to seek employment elsewhere." The Medical Advisor concluded his report by offering the following Opinion and Recommendation:

> "**OPINION:**
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> The independent psychiatric evaluator has diagnosed Mrs. ["K"] with a 'borderline personality' with dissociative features. 'Borderline Personality' is a characterologic disorder hallmarked by a pervasive pattern of unstable and intense interpersonal relationships. It is characterized by alternating idealization and devaluation of relationships; associated with recurrent suicidal gestures or threats; marked reactivity of mood, such as irritability, and transient stress related paranoid ideation or disassociation. Treatment may be difficult because a person with the disorder often adopts the attitudes and behaviors of others, giving the impression of being fairly well adjusted. Medication usually can control the depressive aspects of the condition. The problems with relationships may require that a person with the disorder to make an effort to change surroundings in order to bolster self-esteem.
>
> This primary characterologic disorder impairs Mrs. ["K"]'s ability to successfully perform, on a sustained basis, collaborative tasks because it causes her to perceive the IMF as demanding and insensitive. Nevertheless, it does not totally incapacitate her from

> performing tasks that the IMF might reasonably ask of her. Her other medical conditions are not thought to be major contributors to [her] impairments. Her depression is in remission. Her breast cancer has not recurred. Although intensive therapy would be expected to lessen the negative consequences of her characterologic disorder; given her personality type, she is unlikely to substantially commit herself to long-term intensive psychotherapy. Under the circumstances, Mrs. ["K"] is unfit to perform satisfactorily her IMF job function because of the constellation of psychologic factors associated with her characterologic disorder.
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> Although not totally incapacitating, her characterologic disorder causes her to have difficulty effectively collaborating with co-workers. This impairment becomes more problematic when she is experiencing other problems, such as anxiety associated with breast cancer therapy, or when it becomes associated with depression. Such co-existent factors aggravate her coping ability. Her limited personal adaptive capabilities perpetuate her unfitness to successfully perform her job.
>
> Furthermore, her capacity to satisfactorily perform her job function has been aggravated by her protracted absence from the IMF work environment. Her condition is permanent in that she will not be able to return to the IMF and perform satisfactorily.
>
> Accordingly, Mrs. ["K"] is unfit to successfully perform the tasks of her position; therefore, an agreed upon employment separation on that basis is likely to be mutually beneficial and warranted to her and the IMF.
>
> **RECOMMENDATION:**
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> Mutually agreed upon separation because of unfitness."

Decision of the Administration Committee

19. On March 1, 2001, the Administration Committee met to render a decision on Ms. "K"'s Request for disability retirement. The Committee's discussion of Applicant's case is summarized in its Final Minutes, which read in part as follows:

> "This ... case involved a staff member with a personality disorder and for whom ma[n]y accommodations had been made in the work place. The Medical Advisor felt that the external evaluator had done a thorough job in assessing the person's current

> condition. Prior medical conditions were either in remission or under control. The person's attitude and ability to work might improve but their personality precluded them from committing to a course of therapy that could improve their condition. The person was neither acutely depressed nor psychotic and could perform the duties of their job. However, because of their unpredictable personality, there would likely be interpersonal friction if they returned to the workplace.
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> ...
>
> A return to the workplace was no longer a viable option because the person was reluctant to return to work and co-workers were fearful of her behavior."

20. The Committee also discussed whether the Applicant could work at home, but considered that this option would still require extensive contact with the workplace, resulting in "interpersonal friction." The Administration Committee concluded that Ms. "K" did not qualify for disability retirement.

21. The Committee's Decision was issued on March 14, 2001, informing Ms. "K":

> "It has been found that your case does not meet the requirement of Section 4.3 (a) (i) of the Staff Retirement Plan, which states 'such participant, while in contributory service, became totally incapacitated, mentally or physically for the performance of any duty with the Employer that he might reasonably be called upon to perform.'"

The Decision included no reasons for the Committee's determination or any information as to avenues of recourse. Instead, it advised Applicant to contact a particular official of HRD "... to discuss other options."

The Channels of Administrative Review

22. The case of Ms. "K" – and another of Ms. "J" also decided this day - are the second and third to come to the Administrative Tribunal through the channels of administrative review established by the issuance in 1999 of Rules of Procedure by the SRP Administration Committee, and they are the first cases to reach the Tribunal to arise from the denial of requests for disability retirement.[5] (Decisions arising under the SRP that are within the

[5] Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-2 (November 20, 2001), paras. 31-35, considered the exhaustion of administrative review in a case involving a dispute arising under Section 11.3 of the Plan.

competence of the Administration or Pension Committees of the Plan are expressly excluded from the jurisdiction of the Fund's Grievance Committee.)[6] Rule VIII of the Rules of Procedure of the SRP Administration Committee[7] provides that a Requestor may file with the SRP Administration Committee an application for review of a Decision of the Committee

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[6] GAO No. 31, Rev. 3 (November 1, 1995) provides in pertinent part:

"4.03 *Limitations on the Grievance Committee's Jurisdiction.* The Committee shall not have jurisdiction to hear any challenge to ... (iii) a decision arising under the Staff Retirement Plan that is within the competence of the Administration or Pension Committees of the Plan."

[7]

"RULE VIII

Review of Decisions

1. A Requestor, or any other person claiming any rights or benefits under the Plan, who wishes to dispute a Decision may submit an Application for Review of a Decision (hereinafter "Application") to the Secretary within ninety (90) days after the Requestor receives a copy of the Decision. An Application shall satisfy all of the requirements as to form set forth in Rule III and otherwise applicable to a Request. Subject to Rule X, paragraph 2, if no Application has been submitted within this period and an extension of time described in Rule IX, paragraph 2 has not been granted, the right to submit an Application shall cease.

2. The Committee may review a Decision, either in response to a timely Application or at its own initiative. The Committee may also be required to review a decision at the request of the Pension Committee in accordance with the jurisdiction of that Committee as set out in Section 7.1(c) of the Plan. The Committee shall not, however, review a Decision so as to affect adversely any action taken or recommended therein, except in cases of:

   (a) misrepresentation of a material fact;
   (b) the availability of material evidence not previously before the Committee; or
   (c) a disputed claim between two or more persons claiming any rights or benefits under the Plan.

3. If the Committee undertakes to review a Decision, or if it declines to review a Decision, all parties to the Decision shall be notified in writing.

4. Any review of a Decision shall be conducted in accordance with Rules IV, VI and VII. The Committee shall notify the Applicant of the results of its review within three months of the receipt of the Application by the Secretary."

within ninety days of its receipt, and Rule X[8] provides that the channel of review for a Request submitted to the SRP Administration Committee has been exhausted for the purpose of filing an application with the IMF Administrative Tribunal when the Committee has notified the applicant of the results of its review of that Decision.

Ms. "K"'s Application to Administration Committee for Review of Decision

23. On June 16, 2001, Ms. "K" submitted to the SRP Administration Committee an application for review of its Decision denying her Request for disability retirement. To that application, Ms. "K" appended a letter from her treating psychiatrist, as additional information for the Committee's consideration.

24. The treating psychiatrist's letter, dated June 15, 2001 indicated that Ms. "K" had been a patient of his since August 21, 2000. She had a history of "major depressive episodes" over the preceding six years, precipitated by her breast cancer and difficulties at work. She also experienced "overwhelming persistent anxiety" and "paranoid behavior" related to the workplace, and the treating psychiatrist expressed concern that a return to work would

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[8] "**RULE X**

Exhaustion of Administrative Review

1. The channel of administrative review for a Request submitted to the Committee shall be deemed to have been exhausted for the purpose of filing an application with the Administrative Tribunal of the Fund when, in compliance with Article V of the Statute of the Administrative Tribunal (Statute):

   (a) three months have elapsed since an Application for review of a Decision was submitted to the Committee in accordance with Rule VIII, paragraph 1 and the results of the review have not been notified to the Applicant; or
   (b) the Committee has notified the Applicant of the results of any review of a Decision, or its decision to decline to review a Decision; or
   (c) the conditions set out in Article V, Section 3(c) of the Statute have been met.

2. The channel of administrative review for:

   (a) a Request or a Decision referred by the Committee to the Pension Committee for decision in accordance with Rule V; or
   (b) a matter otherwise before the Pension Committee for decision,

shall not be deemed to have been exhausted until a decision has been made by the Pension Committee and notified to the Requestor or a person otherwise seeking the decision. If a Request is referred back by the Pension Committee to the Committee for decision, in accordance with Rule V, paragraph 3, then Rule X, paragraph 1 shall apply."

exacerbate her symptoms. He concluded by expressing his opinion that Ms. "K" is totally incapacitated from work:

> "Based on her mental disorder, which is major depressive disorder recurrent, severe, in addition to chronic Lyme disease, which is manifested by mood swings, generalized fatigue, difficulty concentrating and arthritic problems; and history of breast cancer, which is fortunately currently in remission, Mrs. ["K"]'s conditions are permanent in that they not only totally incapacitate her from performing tasks that the IMF might reasonably ask of her, but from performing a job anywhere else."

Additional Medical Review by the Administration Committee

25. Following the filing of Ms. "K"'s June 16, 2001 application for review of its Decision, the SRP Administration Committee embarked upon an additional assessment of her medical status. The Committee engaged a psychiatrist specializing in neuropsychiatric medicine and occupational psychiatry to undertake reviews of those medical records that earlier had been collected by the Joint Bank/Fund Health Services Department ("HSD") and had been used by the Committee's Medical Advisor to develop his initial opinion. Additionally, the reviewing psychiatrist requested and was granted the opportunity to conduct an in-person assessment of the Applicant. The impressions of the reviewing psychiatrist were later transmitted to the Medical Advisor who, in turn, indicated his opinion.

26. The reviewing psychiatrist performed an initial review of records August 25, 2001. These records consisted of information from several different physicians and dated back to 1998. A note of March 30, 2000 from an earlier treating physician (recommending disability retirement to HSD) is quoted:

> "Since going on medical disability, she has continued to have intermittent periods of depression in spite of antidepressant medication and psychotherapy."

The record review also revealed various life circumstances, including the death from cancer of Ms. "K"'s husband, a head injury to her son, and her 1995 diagnosis with breast cancer followed by medical and surgical complications. Ms. "K" had recounted to one physician that she had been depressed most of her life, but "usually not 'badly.'"

27. The reviewing psychiatrist concluded, based on the record review, that the three most plausible diagnoses for Ms. "K"'s condition were "Borderline Personality Disorder, Recurrent Depression secondary to that, and/or an alternate form of Bipolar Disorder." He elaborated his views on her employability as follows:

> "If the diagnoses are correct as above, this patient would be periodically hampered from performing adequately in the workplace, but not permanently. There would be a general

> tendency to misinterpret and mistrust, making it difficult to work with coworkers and vice versa and overreaction with mood swings. Although technically she could do any job within the IMF, on a practical level it would be very difficult for her to work within a vocational context without overreacting to what she perceives as discrimination, rejection or 'different treatment,' and would be very difficult for the organization to tolerate her behavior. I do agree with Dr. ... that technically she is not disabled, but on a practical level would find working difficult and the organization would find her difficult to work with based on the above.
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> ... She is technically not disabled, but both she and any organization would find it hard to work together."

28. Thereafter, on September 5, 2001, the reviewing psychiatrist undertook his own psychiatric evaluation of Ms. "K", which included an interview and psychological testing. He noted that Ms. "K" was continuing to see the treating psychiatrist who had provided the letter of June 15, 2001 and that her treatment included medication. The reviewing psychiatrist's conclusions are summarized as follows.

> "….
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> This is a patient with multiple psychiatric problems. Her view of her surroundings is colored and altered by several factors: One, the tendency towards paranoid ideation, which is not frank paranoia, but suspiciousness with ideas of reference, possibly the bipolar disorder. There is no clear delineation that this is bipolar, although she has certainly been treated for it. ...
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> ....
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> The patient certainly would have difficulty in fitting into groups and working consistently without problems. However, this is not a consistently disabling condition and I do not believe at this time that she is disabled. I do believe that she sees her life through the prism of referential thinking part of, in this case, the personality disorder and at times through the prism of bipolar, but in general, the patient seems to be able to do her work.
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> Therefore, my original impression is reinforced, that is, that the patient finds it intermittently difficult to work in groups and groups find it intermittently difficult to work with the patient, but that she is not totally disabled from her work by any psychiatric condition.
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> There is no suggestion that work contributed in any meaningful manner to this patient's psychiatric difficulties. While she may

> have had reactions to her perceptions and to events at the workplace, her psychiatric symptoms emanate from biologic, developmental characterologic constructs endemic to her personality and neurochemistry."

29. Additionally, the reviewing psychiatrist reviewed records of the treating psychiatrist and reported on these on November 11, 2001. These notes indicate diagnosis by the treating psychiatrist of bipolar disorder. The reviewing psychiatrist drew the following conclusion:

> "Basically, however, in reviewing his notes, they are consistent with my evaluation of the patient. The inconsistency arises because [the treating psychiatrist] feels that she is totally disabled for all work and I do not."

30. Finally, the reviewing psychiatrist also provided a review of psychological testing that had been performed by a psychologist. This testing revealed a patient "... who has considerable psychological pathology which alters the way in which she perceives external stimuli." The reviewing psychiatrist opined:

> "Ms. ["K"] has significant premorbid pathology which does not formally disable her from work, but which would make it very difficult to work with her or for her to work with others. However, she is not disabled from her occupation or for any occupation for which she is trained or has reasonable experience."

Medical Advisor's Final Report to the Administration Committee and Additional Information

31. On April 25, 2002, the Medical Advisor prepared his final report to the SRP Administration Committee in connection with Ms. "K"'s application for review of the Committee's initial Decision. The Medical Advisor noted that he had reviewed the findings of the reviewing psychiatrist, the letter from the treating psychiatrist, and records of Ms. "K"'s infectious disease specialist, but that this additional information had not changed his opinion. He stated his conclusions as follows:

> "I had concluded that Mrs. ["K"] had a 'Borderline Personality' with dissociative features that was characterized by a pervasive pattern of unstable interpersonal work relationships. These conditions required her to make efforts to change her surroundings in order to bolster self-esteem and stress-related paranoid ideation. Medication had controlled the depressive aspects of this mental condition.
>
> Although not totally incapacitating, her characterologic disorder and her limited personal adaptive capabilities make it difficult for her to collaborate with co-workers; and therefore, to successfully

> perform the required tasks of her position. Intensive psychotherapy would be expected to lessen the negative consequences that her personality disorder has upon her workplace functioning."

32. Finally, at the suggestion of the Administration Committee, additional review (of records) was sought from an infectious disease specialist, with regard to references in Ms. "K"'s records of "chronic Lyme Disease." According to the Fund, that review was delivered in the format of a letter from external counsel because the reviewing physician was unable to provide a written report before the Committee's upcoming meeting date. The letter summarized the conclusions of the reviewing infectious disease specialist that Ms. "K" most likely had suffered from Lyme Disease in the past but that she had been successfully treated, as there was no evidence of persistent disease of the joints or central nervous system. The Medical Advisor expressed his concurrence with that assessment on May 2, 2002.

The Administration Committee's Decision on Review

33. On the same day, May 2, 2002, the Secretary of the Administration Committee transmitted to the Committee's members documentation for their consideration of Ms. "K"'s application for review. This documentation included: (a) Ms. "K"'s original Request for disability retirement and the Medical Advisor's original opinion; (b) Ms. "K"'s application for review; (c) reports of the reviewing psychiatrist; (d) the letter summarizing views of the reviewing infectious disease specialist; and (e) the Medical Advisor's final report.

34. In the covering memorandum to the Committee, the Secretary of the Administration Committee noted that in the course of collecting medical records from known treating physicians, additional treating physicians were identified and that a time-consuming effort had been made to collect additional records for review in the case. The Secretary concluded that the reviewing physicians and the Medical Advisor were of the opinion that the Applicant is not totally and permanently disabled, that her condition is treatable, and that there are jobs at the Fund that she could be called upon to perform.

35. The following week, on May 9, 2002, the Administration Committee met to decide on Ms. "K"'s application for review. Salient excerpts of the Committee's Final Minutes are provided below:

> "....
>
> …. A member asked for clarification of points in the Medical Advisor's opinion. The member wanted to know ... how difficult it was for others to work with the participant and if these difficulties could make it impossible for the person to do the job even though they were technically capable of performing the duties of the job.
>
> The Legal Representative noted that the underlying cause of the person's difficulties had to be considered. Another member asked if the person's medical condition qualified her as disabled under

the Plan. A member noted that there was a certain moral hazard in granting a disability pension to a person who had an apparent treatable personality disorder as opposed to an incapacitating mental illness. The Committee agreed on this point. ...

…. [The Medical Advisor] also noted that the participant frequently changes physicians and does not fully comply with prescribed medical regimes. He went on to indicate that the participant has been diagnosed as a borderline personality and this characterological condition primarily influences the participant's behavior. Treatment is difficult because the participant can but does not comply with the treatment regimes. …

…. The Medical Advisor indicated that the condition can be controlled with medication usually for depression and anxiety.

A member asked if a harassing environment would induce such a condition. The Medical Advisor replied that the records indicate that this condition existed at an early developmental period in the participant's life and that while it is not easy to classify, the condition does not start with one or two incidents but develops over a person's life time.

The Chair asked if this condition would be considered disabling by the Plans of other organizations, to which external counsel replied that it would not be considered disabling. ... The Advisor also noted that the key to determining incapacity in this instance is whether there is a volitional problem as with thought disorders where the person has no choice because they are confused, disoriented or delusional. In this case, the person's thinking is not disordered and they do have a choice to comply or not to comply with a treatment regime which could help her. The Medical Advisor further elaborated that the participant's condition reflected poor impulse control. She could follow a treatment regime by taking prescription drugs to control her behavior. There is no reason in the record why she cannot do so.

…. It was noted that the Plan cannot require anybody either to take medicine or undergo surgery, but that does not mean that the Plan is required to grant a disability pension to a member who refuses treatment that will alleviate or eliminate the disability. The member asked whether the condition was not an illness, and the Medical Advisor reiterated that the condition was a character disorder reflecting the participant's difficulties in relating to other people. ... It was not clear why the person stopped taking

> medication. Another member remarked that the participant seemed very sick, and referenced one of the reviewing physicians' reports where it was noted that while the person was not disabled, practically it would be difficult for the person to work with others. The Medical Advisor asked rhetorically if a person does not get along with others should they qualify for a disability pension. External counsel noted that she can perform the functions of her job. A member asked if the participant's inability to get along with other people is a medical condition that could qualify them for a disability pension. The Legal Representative noted that when the person can do the job, even though not on a sustained long-term basis, they are not permanently and totally disabled. Another member noted that it is not appropriate to grant a disability pension simply because a person cannot or does not want to work within the organization's structure and deal with other staff.
>
> The Medical Advisor reiterated that this was a developmental disorder, and not a thought disorder. Since there are jobs that the participant could perform, she is not totally disabled. In addition, since her condition can be controlled with prescription drugs even though there is expected to be recidivism, she is not permanently disabled.
>
> ...."

36. Accordingly, the Administration Committee decided unanimously to sustain its original Decision and communicated to Applicant its Decision on Review by letter of May 17, 2002. The decision letter set forth the standard for disability retirement and described the process of medical review that the Committee had undertaken in her case. The Committee stated its conclusions as follows:

> "Since 1990, you have been given opportunities to work as a Staff Assistant in several different areas. ... The Committee concluded that it is within your capacity to perform the duties required of Staff Assistants.
>
> Taking all of the circumstances into account, the Committee concluded that your condition is treatable and so is not a total and permanent disability as required by the Plan."

The final paragraphs of the Decision on Review advised Ms. "K" of her right to contest the decision in the Administrative Tribunal.

37. On August 15, 2002, Ms. "K" filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

38. The principal arguments presented by Applicant in her Application and Reply are summarized below.

1. Applicant is totally and permanently incapacitated within the meaning of SRP Section 4.3.

2. The SRP Administration Committee incorrectly interpreted the applicable Plan provision to require the symptoms of a psychiatric disorder to be continuous in order to be totally incapacitating. Applicant's symptoms do not wax and wane in a predictable manner so as to allow the employer to accommodate their periodicity.

3. An incapacity is "permanent" within the meaning of SRP Section 4.3 when the symptoms arise at irregular intervals but with such frequency as to prevent the Applicant from functioning as an employee for indeterminate periods.

4. Applicant is unable to perform her job or any other job.

5. Within the context of Applicant's remaining working life, she is totally and permanently disabled, although a younger person might not be so classified.

6. The Fund's administration is in the best position to determine the effect of Applicant's medical condition on her ability to perform her job or other work with the IMF. The physicians' definitions of total incapacity are entitled to no more deference than are laymen's in determining fitness for work. The administration has concluded that Ms. "K" is not a candidate for continued employment with the IMF, yet she is determined not to be totally incapacitated for purposes of disability retirement.

7. Applicant has attempted to alleviate her condition by undergoing psychotherapy and taking prescribed medications; she has cooperated with the treatment regimens of her treating physicians.

8. The medical evidence shows that a return to work would likely exacerbate Applicant's symptoms.

9. The nature of borderline personality disorder should not be minimized, as the term "borderline" signifies the border between neurosis and psychosis, not between normalcy and mild neurosis.

10. The Administration Committee's decision was procedurally defective because the medical experts were not jointly selected to be truly independent, the Committee considered a hearsay report of the findings of one of the reviewing physicians, and

" [t]he information provided the Committee excluded applicant's [i]nformation in its entirety."

11. Applicant seeks as relief:

a) that the Tribunal order that Applicant be granted a disability pension retroactively;

b) that "all funds deducted from her service accounts be recredited;"[9] and

c) legal costs.

Respondent's principal contentions

39. The principal arguments presented by Respondent in its Answer and Rejoinder are summarized below.

1. The Administration Committee correctly applied the terms of the Plan to determine that Applicant is not totally and permanently incapacitated within the meaning of SRP Section 4.3.

2. Intermittent incapacity is not "total" incapacity under the SRP. As long as Applicant can perform her duties, even if not on a sustained basis, she is not totally and permanently incapacitated.

3. The Administration Committee properly determined that Applicant could perform the functions of a Staff Assistant even though her personality disorder could make it intermittently difficult for her to get along with colleagues.

4. Assuming that Applicant is currently totally incapacitated, this incapacity is not likely to be permanent. Applicant's condition is treatable.

5. The record shows that Applicant has been insufficiently committed to a treatment program that would control her symptoms. Her thinking is not disordered, and she could choose to comply with such a program.

6. At age 52, Applicant has approximately 13 years of remaining working life until mandatory retirement. She has not established that this is insufficient time for treatment of her personality disorder.

[9] Respondent has answered that no credits have been deducted from any accounts of Applicant and that Applicant has not elaborated what credits she believes should be restored.

7. Disability retirement, which entails a lifelong commitment on the part of the Fund, is intended for the most extreme medical conditions. A condition such as Applicant's may be an appropriate case for medical separation but not for disability retirement.

8. The terms of the SRP clearly contemplate that the Administration Committee's decision must be based on, and consistent with, the expert advice of its Medical Advisor.

9. The Administration Committee acted appropriately in considering the opinions of both reviewing and treating physicians. That the underlying records of the treating physicians are not provided to Committee members does not represent a failure of process because the records are of a sensitive nature and the members do not have the expertise to evaluate them.

10. Applicant has not shown any bias on the part of the reviewing physicians or that it was improper for the Committee to accept a summary by external counsel of the report of the infectious disease specialist. Applicant has not shown that the Committee failed to take into account any material information that would have affected its decision.

Consideration of the Issues of the Case

The Administrative Tribunal's Standard of Review for Disability Retirement Cases

The Administrative Tribunal in this case applies the standard of review for disability retirement cases as adopted and elaborated in greater detail in the case of Ms. "J" also decided today. The essence of that standard is set forth below.

40. The Administrative Tribunal's standard of review in all cases is governed by the second sentence of Article III of the Statute of the Administrative Tribunal, which provides:

> "In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts."

The standard of review describes the relationship between the Administrative Tribunal and the decision maker responsible for the contested decision. It represents the degree of deference accorded by the Tribunal to the decision maker's judgment. The standard of review is designed to set limits on the improper exercise of power and represents a legal presumption about where the risk of an erroneous judgment should lie. The degree of deference – or depth of scrutiny – may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker.

41. A distinguishing feature of the problem posed by review of decisions of the Administration Committee of the Staff Retirement Plan is that the Committee plays a dual role within the dispute resolution system. It is responsible for taking the administrative act that may be contested in the Administrative Tribunal and it also supplies what is deemed a channel of review for purposes of the exhaustion of remedies requirement of Article V of the Tribunal's Statute when, pursuant to Article VIII of its Rules of Procedure, it reconsiders its own decision.[10] Accordingly, while a decision of the Grievance Committee will not be subject to direct review by the Administrative Tribunal,[11] a decision of the SRP Administration Committee necessarily will be.

42. In resolving the question of the appropriate standard of review in a given case, the Administrative Tribunal looks to the following sources: a) the text of Article III, requiring that it apply "... generally recognized principles of international administrative law concerning judicial review of administrative acts," b) the published Commentary on the Statute, i.e. the Report of the Executive Board proposing the Statute's adoption, c) the jurisprudence of the IMFAT, and d) the jurisprudence of other international administrative tribunals.

43. In Ms. "J", the Tribunal reviewed the Statutory Commentary and observed that the IMFAT's jurisprudence has confirmed many of the principles articulated therein. Hence, in a variety of contexts, the Administrative Tribunal, in discharging its responsibility to review the lawfulness of challenged administrative acts, has acknowledged, and deferred to, the exercise of the managerial discretion of the Fund. This deference is at its height when the Tribunal reviews regulatory decisions (as contrasted with individual decisions), especially policy decisions taken by the Fund's Executive Board. In cases involving the review of

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[10] In this regard, it may be considered that the "standard of review" applied by the Administration Committee in reviewing its own decisions is supplied by Rule VIII of its Rules of Procedure. Paragraph 2 of that Rule provides in pertinent part:

> "2. ...
>
> The Committee shall not, however, review a Decision so as to affect adversely any action taken or recommended therein, except in cases of:
>
> a) misrepresentation of a material fact;
>
> b) the availability of material evidence not previously before the Committee; or
>
> c) a disputed claim between two or more persons claiming any rights or benefits under the Plan."

[11] *See* Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary as follows:

> "... with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures."

(Report of the Executive Board, p. 19.) It is this standard of review that Respondent in Ms. "J" urged the Tribunal to apply to the review of disability retirement decisions of the Administration Committee.

44. In Ms. "J", the Tribunal observed that the standard articulated in the Commentary for review of individual decisions involving managerial discretion comprehends a number of different factors. Hence, its operation in a particular case may emphasize one factor over others or it may involve multiple factors, depending upon such variables as the nature of the contested decision and the grounds on which the applicant seeks that it be impugned. When the Tribunal reviews an administrative act of the Fund to determine if the decision taken has been "arbitrary or capricious," i.e. the component of the standard of review that Respondent emphasized for application in Ms. "J", it applies its least rigorous level of scrutiny.

45. The IMFAT's jurisprudence also suggests that an important element in determining the standard of review may be the nature of the underlying decision-making process that is subject to the Tribunal's review. *See* Ms. "Y" (No. 2), para. 65: "It may be noted as well that the degree of the Tribunal's review is necessarily dictated by the nature of the process being reviewed." Respondent in Ms. "J" characterized a decision of the SRP Administration Committee denying an application for disability retirement as "quintessentially a discretionary judgment." The Administrative Tribunal considered whether the process undertaken by the SRP Administration Committee in taking a decision on an application for disability retirement is properly characterized as an act of managerial discretion or as something different. The Tribunal concluded that the process of construing the applicable terms of the Staff Retirement Plan and applying them to the facts of a particular case to determine the applicant's entitlement or not to the requested benefit may more closely resemble a judicial act than one typically taken pursuant to managerial authority.

46. A second respect in which a decision arising from the SRP Administration Committee may be distinguished from an administrative act taken in the exercise of managerial discretion is that the channel of review applicable to such decisions does not involve review by the Managing Director. Individual decisions taken under the Staff Retirement Plan are exclusively vested in the Administration Committee, subject only to direct appeal (following

reconsideration by the Committee) to the Administrative Tribunal.[12]

47. In Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-2 (November 20, 2001),[13] the IMFAT had the opportunity to explore the nature of this appeal process. While not addressing explicitly the matter of the standard of review to be applied when a decision of the SRP Administration Committee is contested in the Administrative Tribunal, it recognized the unique nature of the appellate authority arising from Section 7.2 of the Plan and Article II[14] of the Tribunal's Statute:

> "The significance of the Tribunal's appellate authority is illustrated by the present case. Absent it, the Applicant and the Intervenor could find themselves without third party remedy." (Para. 141.)

48. In Mr. "P" (No. 2), the Tribunal considered a case arising under SRP Section 11.3 (and Rules thereunder) regarding the giving effect under the Plan to certain domestic relations orders. Respondent framed the question in that case as "'... whether the Committee

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[12] SRP Section 7.2 provides:

> "**7.2 Administration Committee**
>
> …
>
> (b)…Except as may be herein otherwise expressly provided, the Administration Committee shall have the exclusive right to interpret the Plan; to determine whether any person is or was a staff member, participant, or retired participant; to direct the employer to make disbursements from the Retirement Fund in payment of benefits under the Plan; to determine whether any person has a right to any benefit hereunder and, if so, the amount thereof; and to determine any question arising hereunder in connection with the administration of the Plan or its application to any person claiming any rights or benefits hereunder, and its decision or action in respect thereof shall be conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of the Administrative Tribunal…."

[13] Mr. "P" (No. 2) is the only other case arising from a decision of the SRP Administration Committee that has been reviewed on the merits by the IMFAT.

[14] Article II 1(b) provides:

> "***ARTICLE II***
>
> 1. The Tribunal shall be competent to pass judgment upon any application:
>
> …
>
> b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant."

acted properly and in accordance with the [applicable] Rules in deciding to place into escrow a portion of Applicant's pension benefits.'" (Para. 119.) The Tribunal echoed this formulation:

> "The challenge to the legality of the individual decision may be stated as follows: Did the Administration Committee properly apply SRP Section 11.3 and the Rules thereunder in the circumstances of the case?" (Para. 132.)

Significantly, the Tribunal reviewed the "soundness" (para. 144) of that decision and concluded that although the decision of the Committee was "understandable," it was "in error and must be rescinded." (Para. 145).

49. Hence, in Ms. "J", the Tribunal identified two factors that differentiate a decision of the SRP Administration Committee on a request for disability retirement from an act of managerial discretion. First, functionally, the decision may be regarded as "quasi-judicial," requiring the decision maker, i.e. the SRP Administration Committee, to construe the requirements of the applicable provision of the pension Plan and to apply the Plan's terms to the facts of a particular case. Second, the decision is made by an entity, i.e. the SRP Administration Committee, that is vested with the authority to take such decisions on behalf of the Plan without review by the Managing Director. Instead, they are subject to direct appeal (following a decision on reconsideration by the Committee) to the Administrative Tribunal.

50. The distinctions identified above have been noted as well by international administrative tribunals and commentators with regard to review of both disciplinary decisions and decisions under a staff retirement plan. Accordingly, it has been observed that decisions of an international organization that may appear to be discretionary in character may, in fact, involve quasi-judicial decision making. In such cases, the administrative tribunal's standard of review may be heightened accordingly:

> "*... Quasi-judicial powers*
>
> There is a very exceptional category of power which may be described as a quasi-judicial power and which administrative authorities may exercise under their internal law. These powers, although apparently framed in terms of discretionary criteria, are regarded by tribunals as subject to total judicial control unlike discretionary powers. The tribunal can examine the decision taken by the administrative authority *de novo* in order to establish whether the decision was one which the tribunal would have itself taken, had it been called upon to take the initial decision taken by the administrative authority. Thus, it acts rather as a court of appeal than as a court of review.

> ... There is evidence that most tribunals regard the power to take disciplinary measures as being subject to total judicial control.[footnote omitted]"

C.F. Amerasinghe, The Law of the International Civil Service (1994), Vol. I, p. 267.

51. Such heightened scrutiny on the part of an international administrative tribunal is not, however, limited to cases involving review of disciplinary sanctions. Accordingly, the World Bank Administrative Tribunal ("WBAT") reviewing decisions of the Bank's Pension Benefits Administration Committee ("PBAC") on applications for disability retirement, has recognized the distinctive nature of this review, expressly distinguishing the "special appellate jurisdiction" established by the terms of the Bank's pension plan from the Tribunal's ordinary review of acts of managerial discretion:

> "28. In this case the Applicant has, pursuant to Section 10.2 (f) of the Staff Retirement Plan (SRP), appealed from a decision of the Pension Benefits Administration Committee (PBAC) denying his request for a disability pension.
>
> 29. The scope of the review undertaken by the Tribunal varies according to the nature of the case before it. Thus, in matters that fall exclusively within the discretion of the Respondent, the function of the Tribunal is limited to examining whether those decisions are arbitrary, discriminatory, improperly motivated, based on error of fact, carried out in violation of a fair and reasonable procedure or otherwise tainted by an abuse of power (Saberi, Decision No. 5 [1981], para. 24; Suntharalingam, Decision No. 6 [1981], para. 27; Thompson, Decision No. 30 [1986], para. 24; Bertrand, Decision No. 81 [1989], para. 15). In other matters, such as disciplinary measures, however, the jurisdiction of the Tribunal is broader in that it may review the merits of the Respondent's decision. As stated in prior decisions in this respect, 'the Tribunal is not confined to a limited control of abuse of power as if it were purely a matter of executive discretion and...it may exercise broader powers of review in relation to both facts and law' (Carew, Decision No. 142 [1995], para. 32; Planthara, Decision No. 143 [1995], para. 24). This is also the case when the Tribunal is invited to intervene under a special appellate jurisdiction established in the Rules of the Bank.
>
> 30. Under the Staff Retirement Plan, Section 10.2 (f), the decision of the PBAC is final, but it is subject to appeal to the Tribunal. No other internal remedies are available in the Bank. The appeal is made directly to the Tribunal. The determination made by the

> PBAC in this case, denying the request for a disability pension, cannot be regarded purely as a matter of executive discretion…."

John Courtney (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 153 (1996), paras. 28-30. The WBAT has described its review process in such cases as follows:

> "….Accordingly, the Tribunal may examine (i) the existence of the facts, (ii) whether the conditions required by the Staff Retirement Plan for granting the benefits requested were met or not, (iii) whether the PBAC in taking the decision appealed has correctly interpreted the applicable law, and (iv) whether the requirements of due process have been observed." (Id., para. 30.)

52. While in Courtney (No. 2), the WBAT upheld the decision of the Bank's Pension Benefits Administration Committee to deny an application for disability retirement, in a subsequent decision, Ahlam Shenouda v. International Bank for Reconstruction and Development, WBAT Decision No. 177 (1997), the WBAT, applying the identical standard of review (para. 12), concluded to the contrary that the applicant was entitled to disability retirement. The WBAT in Shenouda explained its authority to review the merits of the PBAC's decision, i.e. to decide whether or not the Committee's conclusion was supported by the weight of the evidence. At the same time, it noted that some weight could be given to the views of Committee's Medical Advisor:

> "22. The Tribunal has reviewed the same medical information and opinions that were before the PBAC at the time it considered, and then reconsidered, the Applicant's request....The Tribunal concludes that the result reached by the PBAC, which concurred with the Medical Advisor, is contrary to the clear weight of the evidence.
>
> 23. The Staff Retirement Plan contemplates that the PBAC is to reach a decision that is warranted by the diagnoses and prognoses of the doctors who have directly examined and treated the applicant. The Committee is not to rely solely upon the secondary assessment of the Medical Advisor, who does not examine the applicant and who, he himself concedes, may not necessarily be an expert in all of the wide range of illnesses that come before the PBAC, including fibromyalgia. Yet Section 3.4(a) of the SRP provides that a staff member 'shall be retired on a disability pension if one or more physicians designated by the Committee finds,' that the applicant was then disabled and likely to remain so. In effect, this prevents the award of a disability pension whenever the Medical Advisor believes it to be unwarranted—no matter whether the PBAC disagrees. If it does

> disagree, the only way such a pension can be awarded is if the PBAC appoints another physician who reaches the same conclusion as the PBAC.
>
> 24. But the Tribunal is not so constrained. In sitting on 'appeal' from the decision of the PBAC, the Tribunal can—giving some weight to the views of the Medical Advisor—review independently the written opinions of the physicians who examined or treated the Applicant, and may conclude that the great weight of the evidence, or of the medical opinions, supports or not the claim of a likely permanent disability."

After reviewing the record in Shenouda, the WBAT overruled the decision of the PBAC and held that the applicant should be awarded a disability pension. (Para. 35.)

53. The same result was reached in A v. International Bank for Reconstruction and Development, WBAT Decision No. 182 (1997), in which the WBAT decided, in light of the medical evidence, that the conclusions of the PBAC could not be sustained. (Para. 16). As to the standard of review, the WBAT in A again reaffirmed the standard enunciated in Courtney (No. 2), observing that "[t]he power of the Tribunal under Section 10.2(f) [of the pension plan] is very broad and allows for the examination of all elements of fact and law as well as of procedural fairness and transparency." (Para. 4.)

54. Accordingly, in Ms. "J" the IMF Administrative Tribunal adopted the following standard of review applicable to a decision by the Administration Committee of the Staff Retirement Plan to deny a request for disability retirement:

> 1. Did the SRP Administration Committee correctly interpret the requirements of SRP Section 4.3 and soundly apply them to the facts of the case, or was the Committee's decision based on an error of law or fact?
>
> 2. Was the Committee's decision taken in accordance with fair and reasonable procedures?
>
> 3. Was the Committee's decision in any respect arbitrary, capricious, discriminatory or improperly motivated?

It is this standard that shall be applied in the present case.

Did the Administration Committee Properly Interpret and Apply SRP Section 4.3?

55. Applying the standard of review set forth above, the question on which the Administrative Tribunal must now decide is whether the Administration Committee correctly

interpreted the requirements of SRP Section 4.3(a) and soundly applied them to the facts of Ms. "K"'s case.

56. SRP Section 4.3(a) provides in its entirety:

> "**4.3 Disability Retirement**
>
> (a) A participant in contributory service shall be retired on a disability pension before his normal retirement date on the first day of a calendar month not less than 30 nor more than 120 days immediately following receipt by the Administration Committee of written application therefor by the participant or the Employer; on the condition that the Pension Committee must find, on the recommendation of the Administration Committee and the certification of a physician or physicians designated by the Administration Committee, that:
>
> (i) such participant, while in contributory service, became totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform;
>
> (ii) such incapacity is likely to be permanent; and
>
> (iii) such participant should be retired."

Hence, the two essential qualifications for disability retirement are that 1) the applicant is "… totally incapacitated, mentally or physically, for the performance of any duty with the Employer that he might reasonably be called upon to perform," and 2) the incapacity is "likely to be permanent." It is recalled that in Ms. "J" the dispute as to the interpretation and application of SRP Section 4.3(a) centered on the question of whether, given the applicant's inability to perform the functions of the job she had occupied when her incapacity arose, there were *other* duties that the Fund reasonably could ask her to perform. By contrast, in the case of Ms. "K", the dispute focuses on whether or not the applicant's condition incapacitates her from performing the functions of the job she had occupied for many years. Specifically, this case requires the Tribunal to interpret and apply SRP Section 4.3(a) in the circumstance of a staff member who has been impaired on a recurring basis from performing her job functions as a result of psychiatric illness.

> 1. Under the terms of the Plan, is Applicant "…totally incapacitated, mentally or physically, for the performance of any duty with the Employer that [s]he might reasonably be called upon to perform"?

57. Applicant contends that the Administration Committee incorrectly construed the requirements of the SRP by requiring that the symptoms of a psychiatric disorder be

"continuous" to be totally incapacitating. Ms. "K" asserts that her case raises the question of whether a person with a condition marked by symptoms that are "…irregular in time of appearance, but [which occur] with such frequency as to render the sufferer unable to function as an employee at irregular times for indeterminate durations" is totally and permanently incapacitated under the Plan. Applicant maintains that her symptoms do not wax and wane in a predictable manner so as to allow for their accommodation by the employer. Respondent, on the other hand, contends that "intermittent" incapacity is not "total" incapacity under the SRP, and that as long as Applicant can perform her duties, "even if not on a sustained basis," she is not totally and permanently incapacitated.[15] The conflicting views of the parties raise questions of both law and fact, i.e. whether (or when) recurring incapacity may amount to total incapacity under the terms of the SRP, and whether Applicant's condition so qualifies.

58. Respondent seeks support in the Word Bank Administrative Tribunal's decision in Courtney (No. 2) for the view that a participant who is able to perform some work, even if not on a sustained basis, is not eligible for disability retirement. In Courtney (No. 2), the medical evidence showed that the applicant had developed an illness that had been successfully treated, although a recurrence could not be ruled out. He applied for disability retirement on the basis that he was no longer able to undertake extensive travel and stressful situations that marked his full-time career with the Bank. In rendering its decision upholding the denial of disability retirement, the WBAT observed:

> "The standard of reasonableness does not require that the participant should continue to be able to do exactly what he had been doing. If a staff member, for example, is unfit to travel but is capable of performing duties at headquarters which are compatible both with his experience and the Bank's needs, then it cannot be concluded that he is totally and permanently incapacitated for any duty that he is reasonably called upon to perform and the requirement of the Retirement Plan is not met."

(Para. 33.) Accordingly, the WBAT rejected the applicant's view that his disability should be measured against the kind of work and work-related travel that had been part of his routine activity as a staff member. The Tribunal found that he "…could have still undertaken reasonable work assignments and, therefore, that he was not totally incapacitated." (Para. 34.) In reviewing the facts, the WBAT also noted that the Applicant had engaged in occasional teaching and consultancy arrangements, contradicting his initial assertion that he was unemployed. (Para. 31.)

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[15] This same standard was articulated by the Legal Representative during the deliberations of the Administration Committee. (Administration Committee Final Minutes, May 9, 2002.)

59. The question arises whether the WBAT's decision in Courtney (No. 2) supports the principle that a pension plan participant who can perform job functions but not on a "sustained basis" is not totally incapacitated for purposes of the SRP. In a subsequent judgment, the WBAT summarized its holding in the case as follows: "In Courtney (No. 2), the Applicant's disability was not regarded as total because although it precluded him from continuing to travel for the Bank as part of his employment, it did not prevent him from performing other assignments that required no such travel." (A, para. 13.) Moreover, it may be observed that in other cases a specific finding by the Medical Advisor of inability to perform the functions of a position "on a sustained basis" led to a conclusion that the applicant for disability retirement was totally (although not necessarily permanently) incapacitated. *See, e.g.*, Shenouda, in which the Medical Advisor had opined that the applicant was "'…currently incapacitated from performing on a sustained basis, any tasks that The Bank might reasonably ask of her,'" leading the WBAT to conclude that the consensus among the doctors was that incapacity at the time was total. (Para. 18.) *See also* A, para. 15. Similarly, in Ms. "J", in determining that the applicant for disability retirement could not perform the tasks of a verbatim reporter, the Medical Advisor had advised that Ms. "J" "…currently lacks the residual functional capacity to perform, on a sustained basis, intensive repetitive arm and hand functions."

60. Furthermore, it may be asked whether the (apparently successful) performance of occasional teaching and consulting assignments by Mr. Courtney is analogous to the facts of Ms. "K"'s case, or whether Ms. "K"'s inability to perform her tasks occurred with such frequency, severity, or unpredictability as to render her totally incapacitated for the performance of any duty which the Fund might reasonably call upon her to perform. In analyzing this question it is to be recalled that the finding of the Administration Committee on review was that "... it is within [Ms. "K"'s] capacity to perform the duties required of Staff Assistants." At the same time, the Committee in rendering its initial Decision had concluded that a "... return to the workplace was no longer a viable option because the person was reluctant to return to work and co-workers were fearful of her behavior." The Administration Committee also noted that many accommodations had already been made in the workplace for Ms. "K". Additionally, the Committee considered and rejected the possibility that Ms. "K" would be able to perform her functions by working at home. (Administration Committee Final Minutes, March 1, 2001.)

61. The medical evidence in this case does not speak directly to the question of how frequently Applicant was impaired in her functioning or the precise nature of this intermittent or periodic incapacity. The Medical Advisor and the reviewing psychiatrist both remarked on the recurrent nature of Ms. "K"'s symptoms and drew conclusions about the potential impact on her job performance. The Medical Advisor observed that Ms. "K"'s "... erratic emotional storms have resulted in people in the workplace becoming wary of her," leading him to conclude that her psychiatric disorder "... impairs [her] ability to successfully perform, on a sustained basis, collaborative tasks. ..." At the same time, he concluded that it "does not totally incapacitate" her from performing tasks that the IMF might reasonably ask of her. (Medical Advisor's report of January 26, 2001.) Similarly, the reviewing psychiatrist opined "... this patient would be periodically hampered from performing adequately in the

workplace, but not permanently." (Reviewing psychiatrist's report of August 25, 2001.) Additionally, he noted, "... the patient finds it intermittently difficult to work in groups and groups find it intermittently difficult to work with the patient... ." He concluded that "... this is not a consistently disabling condition. ... in general, the patient seems to be able to do her work." (Reviewing psychiatrist's report of September 5, 2001.)

62. These views may be contrasted with Applicant's own assertion that she is disabled on an unpredictable basis, preventing her disability from being accommodated by the employer. In the opinion of her treating psychiatrist, Ms. "K"'s medical status "... not only totally incapacitate[s] her from performing tasks that the IMF might reasonably ask of her, but from performing a job anywhere else." (Report of treating psychiatrist, June 15, 2001.) The assertion that Ms. "K"'s disability rendered her unable to carry out her job functions would appear to be borne out by the Administration Committee's initial findings that a return to the workplace was not a viable option in the case of Ms. "K", chiefly on account of the effect of her condition on her ability to maintain effective working relationships with colleagues, who were said to be fearful of her behavior. (*See also* Medical Advisor's initial report finding Ms. "K" unfit to perform her job.) Accordingly, although Ms. "K"'s disabling symptoms may be of an "intermittent" character, they may well have had a pervasive effect on her ability to maintain the position of Staff Assistant.

63. In a like vein to Ms. "J", Ms. "K" propounds the view that it is inconsistent for the Fund to determine that Applicant is not a candidate for continued employment, separating her from service for medical reasons under GAO No. 13, Rev. 5, Annex I and GAO No. 16, Rev. 5, while at the same time denying that she is totally incapacitated for purposes of her eligibility for disability retirement. The Fund counters that disability retirement is intended only for the most extreme medical conditions which render the individual totally incapable of performing functions within the organization, and that the eligibility standard for disability retirement is higher than for other benefits because it entails a "lifelong commitment by the Fund."[16]

64. It is noted that GAO No. 16, by its terms, contemplates that there will be SRP participants separated on medical grounds who will *not* qualify for disability retirement. Accordingly, Section 11.02 of that GAO requires that separation not be implemented until a determination on disability retirement has been made under the SRP, a determination which, in turn, affects entitlements to separation benefits. Therefore, under the Fund's internal law, separation for medical reasons cannot determine entitlement to a disability pension. Nonetheless, in the Tribunal's view, the factual circumstances surrounding the separation may be given weight in reviewing the soundness of the SRP Administration Committee's decision on an application for disability retirement. Ms. "K" urges that "[c]ommon sense is

[16] It should be noted that the SRP is an insurance scheme to which both participants and the employer make contributions. In addition, participants receiving disability retirement are subject to periodic reassessment of their eligibility, pursuant to SRP Section 4.3(c) and (d).

the touchstone of decision making regarding disability...," and that "[t]o describe the conduct of a long time employee as intolerable to her employer, to attribute that intolerable conduct to the employee's mental health and then to draw the conclusion that the condition does not constitute total incapacity is illogical."

65. Applicant, furthermore, has linked the issue of the significance of her medical separation to the question of which decision maker is in the best position to decide questions of disability. Applicant maintains that it is the Fund's administration (which has deemed Ms. "K" unsuited for service) that is best equipped to determine fitness for work. Hence, Applicant contends that the physicians' opinions are entitled to no more deference than are laymen's in determining her capacity for employment.

66. Applicant accordingly raises the important issue of who decides incapacity under the SRP, specifically, what role the members of the Administration Committee (vis-à-vis the Medical Advisor) take in the decision-making process. By its terms, SRP Section 4.3(a) requires that a participant in contributory service shall be retired on a disability pension "... on the recommendation of the Administration Committee and the certification of a physician or physicians designated by the Administration Committee." In Shenouda, the World Bank Administrative Tribunal observed that while the parallel provision of the Bank's retirement plan might prevent the Pension Benefits Administration Committee from deviating from the conclusions of the Medical Advisor (unless another physician were appointed who concluded differently), the Administrative Tribunal was not so constrained. Accordingly, in Shenouda, the WBAT reversed the PBAC's decision denying the request for disability retirement on the basis that the Committee's decision was "contrary to the clear weight of the evidence." (Paras. 22-24.) The same result was reached by the WBAT in the case of A, para. 16, in which the WBAT held that the PBAC's conclusions could not be sustained in light of the reports of the treating physicians.

67. In reviewing the soundness of the Administration Committee's decision to deny Ms. "K"'s application for disability retirement, the Tribunal accordingly must consider whether the decision is supported or not by the weight of the evidence. In this assessment, it is appropriate for the Tribunal to consider such factors as a) the internal consistency of the physicians' reports, separating observations as to Applicant's condition from ultimate conclusions with respect to incapacity, and b) whether the Administration Committee drew reasonable conclusions from the evidence.

68. There are, in this case, aspects of the reviewing physicians reports that call into question their internal consistency. For example, in the same report in which the Medical Advisor opined that Ms. "K"'s inability successfully to perform collaborative tasks on a sustained basis "... does *not* totally incapacitate her from performing tasks that the IMF might reasonably ask of her" (emphasis supplied), he also repeatedly stated that she was "unfit" to perform the functions of her position:

> "... Ms. ["K"] is unfit to perform satisfactorily her IMF job function because of the constellation of psychologic factors associated with her characterologic disorder.
>
> ... Her condition is permanent in that she will not be able to return to the IMF and perform satisfactorily.
>
> Accordingly, Ms. ["K"] is unfit to successfully perform the tasks of her position."

(Medical Advisor's report of January 26, 2001.) Striking among the reports of the reviewing psychiatrist is a tendency to juxtapose "technical" or "formal" competence to do a job with a practical assessment of the difficulties Applicant is likely to encounter (or has encountered) in the workplace. Hence, the reviewing psychiatrist commented:

> "Although *technically* she could do any job within the IMF, on a *practical* level it would be very difficult for her to work within a vocational context. ... and [it] would be very difficult for the organization to tolerate her behavior. ...
>
> She is *technically* not disabled, but both she and *any* organization would find it hard to work together."

(Reviewing psychiatrist's report of August 25, 2001.) (Emphasis supplied.) In a subsequent report, the reviewing psychiatrist commented that Ms. "K"'s symptoms do not "... *formally* disable her from work, but ... make it very difficult to work with her and for her to work with others." (Emphasis supplied.)

69. The question arises of what weight should be accorded to the ultimate conclusions of the physicians regarding incapacity (as contrasted with their specific findings and observations) and whether any internal inconsistencies in their reports render them entitled to less deference. The WBAT spoke to this question in part in Courtney (No. 2), para. 32, commenting on a physician's statement (which the record revealed had been drafted by counsel with the objective of supporting the application for disability retirement), cautioning: "The views expressed on disability are opinions and not facts." Moreover, in a telling comment, the reviewing psychiatrist in the present case distinguished his evaluation of Ms. "K" from that of her treating psychiatrist as follows:

> "Basically, however, in reviewing his notes, they are consistent with my evaluation of the patient. The inconsistency arises because [the treating psychiatrist] feels that she is totally disabled for all work and I do not."

(Reviewing psychiatrist's report of November 11, 2001.) Accordingly, in reviewing the medical records, it is necessary to separate the physicians' observations and descriptions of Applicant's condition from the conclusions that they drew as to her incapacity.

70. An additional concern in this case is the possible tendency of the decision makers to minimize the seriousness of Applicant's medical condition, especially as the review process progressed and most strikingly in the deliberations of the Administration Committee on review. By the reviewing psychiatrist's account, Ms. "K" "…is a person with multiple psychiatric problems." She has been diagnosed with depression secondary to borderline personality disorder and possibly bipolar disorder. (Reviewing psychiatrist's reports of August 25, 2001 and September 5, 2001.)

71. With regard to Ms. "K"'s depression, after examining Applicant's medical records, the reviewing psychiatrist remarked that "... Ms. ["K"]'s notes are characterized by diagnoses most consistently of recurrent depression." (Reviewing psychiatrist's report of August 25, 2001.) Applicant's treating psychiatrist characterized her mental disorder as "major depressive disorder recurrent, severe," noting that she had suffered major depressive episodes over the preceding six years. (Report of treating psychiatrist, June 15, 2001.) The Medical Advisor in his initial report to the Administration Committee noted a history of "depressive episodes resulting in suicide attempts." (Medical Advisor's report of January 26, 2001.) Nonetheless, the Medical Advisor characterized Applicant's recurrent depression as "in remission," based on the findings of an earlier evaluator.[17] (Medical Advisor's report of January 26, 2001.)

72. Significantly, the reviewing psychiatrist was of the opinion that Ms. "K"'s depression was "secondary to" borderline personality disorder. (Reviewing psychiatrist's report of August 25, 2001.) The Medical Advisor later opined that "[m]edication had controlled the depressive aspects of this mental condition." (Medical Advisor's report of April 25, 2002.) Accordingly, the opinions of the reviewing psychiatrist and Medical Advisor, and later the discussion in the Administration Committee, focused upon Applicant's diagnosis of borderline personality disorder, addressing the question of whether the symptoms of that condition rendered Ms. "K" "totally incapacitated" under the terms of the SRP.

73. The following statement in the public domain, a publication of the U.S. National Institutes of Health, is pertinent[18]:

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[17] By contrast, the reviewing psychiatrist in his record review noted a report of a treating physician that, as of March 30, 2000, Ms. "K" continued to experience intermittent periods of depression despite treatment. (Reviewing psychiatrist's report of August 25, 2001.)

[18] Somewhat similar information, from a private mental health website, was included with Applicant's Reply as Attachments A and B.

> "Borderline personality disorder (BPD) is a serious mental illness characterized by pervasive instability in moods, interpersonal relationships, self-image, and behavior.…Originally thought to be at the 'borderline' of psychosis, people with BPD suffer from a disorder of emotion regulation….There is a high rate of self-injury without suicide intent, as well as a significant rate of suicide attempts and completed suicide in severe cases.[footnote omitted] Patients often need extensive mental health services, and account for 20 percent of psychiatric hospitalizations.[footnote omitted] …
>
> ….
>
> ….BPD often occurs together with other psychiatric problems, particularly bipolar disorder, depression, anxiety disorders, substance abuse, and other personality disorders.
>
> ….
>
> Treatments for BPD have improved in recent years. Group and individual psychotherapy are at least partially effective for many patients. Within the past 15 years, a new psychosocial treatment termed dialectical behavior therapy (DBT) was developed specifically to treat BPD, and this technique has looked promising in treatment studies.[footnote omitted] Pharmacological treatments are often prescribed based on specific target symptoms shown by the individual patient. Antidepressant drugs and mood stabilizers may be helpful for depressed and/or labile mood. Antipsychotic drugs may also be used when there are distortions in thinking.[footnote omitted]
>
> ….
>
> Although the cause of BPD is unknown, both environmental and genetic factors are thought to play a role in predisposing patients to BPD symptoms and traits….
>
> …."

(NIH Publication No. 01-4928, found at http://www.nimh.nih.gov/publicat/bpd.cfm) This quotation indicates that borderline personality disorder is both a serious mental illness and one that may be difficult to treat.

74. The Final Minutes of the Committee's deliberations on Ms. "K"'s application for review reflect that "[t]he Committee agreed" that "... there was a certain moral hazard in granting a disability pension to a person who had an apparent treatable personality disorder

as opposed to an incapacitating mental illness." (Administration Committee's Final Minutes, May 9, 2002.) (Emphasis supplied.) Later in the discussion, a member of the Committee "... asked whether the condition was not an illness and the Medical Advisor reiterated that it was a character disorder reflecting the participant's difficulties in relating to other people." (Id.) When another member remarked that the participant "seemed very sick," it was reported that "[t]he Medical Advisor asked rhetorically if a person does not get along with others should they qualify for a disability pension." (Id.) A Committee member thereafter observed that "... it is not appropriate to grant a disability pension simply because a person cannot or does not want to work within the organization's structure and deal with other staff." (Id.)

75. It may be asked whether, in the discussion of the Administration Committee, the Medical Advisor somewhat discounted the seriousness of Applicant's medical condition and the difficulty of its treatment, in contrast to his own earlier reports. For example, in the Medical Advisor's initial report of January 26, 2001, he had asserted that treatment of borderline personality disorder "may be difficult," noting that Ms. "K" had not undergone psychotherapy of "sufficient intensity and frequency" to treat the condition. He also observed that medication can usually control the "depressive aspects" of the condition. (Medical Advisor's report of January 26, 2001.) In his final report of April 25, 2002, the Medical Advisor reaffirmed that "intensive psychotherapy" would be expected to "lessen" the negative consequences of the disorder on Ms. "K"'s workplace functioning. (Medical Advisor's report of April 25, 2002.)

76. These views, it may be observed, are consistent with the information provided in the NIH publication, i.e. that patients with borderline personality disorder often need extensive mental health services, that psychotherapy is at least partially effective in many cases, and that medication may be helpful for depressed mood. (NIH Publication No. 01-4928.) Similarly, the information source on borderline personality disorder attached to Applicant's pleadings suggests: "Psychotherapy is nearly always the treatment of choice for this disorder; medications may be used to stabilize mood swings." (Borderline Personality Disorder, http://www.mentalhealth.com.)

77. Nonetheless, despite the Medical Advisor's reports citing the importance of psychotherapy to the treatment of Ms. "K"'s personality disorder, the Final Minutes of the deliberations of the Administration Committee do not contain any discussion of psychotherapy as an element in her treatment. Instead, it is noted that "... her condition can be controlled with prescription drugs." (Administration Committee's Final Minutes, May 9, 2002.)

78. There is thus a certain inconsistency in the evaluation of the medical condition of the Applicant. Nonetheless, the Administrative Tribunal, having reviewed the evidence that was before the Medical Advisor and the Administration Committee, concludes that the Applicant is totally incapacitated, mentally, to perform the duties in the Fund that she might be reasonably called upon to perform, namely those of Staff Assistant, particularly because her mental condition renders her unable to collaborate constructively with co-workers.

2. Having found that Applicant is "totally incapacitated" under the terms of the Plan, is that incapacity "likely to be permanent"?

79. Having found that Applicant is totally incapacitated for the performance of any duty that the Employer may reasonably ask her to perform, the Tribunal next must ask whether that incapacity is "likely to be permanent." (SRP Section 4.3 (a) (ii).) "Disability must first be total and, secondly, likely to be permanent (that is, not transitory) and both elements are related to any duty that the participant might reasonably be called upon to perform." Courtney (No. 2), para. 33.

80. In Shenouda, the WBAT identified several factors to be considered in determining whether total incapacity is likely to be permanent:

> "... the extent to which the Applicant's condition was or was not improving over time, whether it could be expected to respond to medication, exercise, and the like, and whether the Applicant was reasonably complying or not with such a regimen."

(Para. 22.) In the case of Ms. "K", the question of the likely permanency of her condition centers on the issues of the seriousness of her illness, the ease of its treatment, and Applicant's reasonable compliance or not with available treatment options. It is recalled that the decision of the Administration Committee on review was that, taking all of the circumstances into account, Ms. "K"'s condition was "... treatable and so is not a total and permanent disability as required by the Plan." (Administration Committee's decision on review, May 17, 2002.) Is this conclusion consistent with the proper interpretation of the SRP and with the evidence in the case?

81. The potential for permanency of Applicant's condition was remarked upon by a number of observers. Significantly, the Medical Advisor in his initial report to the Administration Committee concluded that Ms. "K"'s "... condition is permanent in that she will not be able to return to the IMF and perform satisfactorily." (Medical Advisor's report of January 26, 2001.) Similarly, the Administration Committee, while taking its initial decision to deny Ms. "K"'s application for disability retirement, at the same time, in its discussion, had taken the view that a return to the workplace was "no longer a viable option." (Administration Committee Final Minutes, March 1, 2001.) The Administrative Tribunal accordingly concludes that the Administration Committee's initial decision that Ms. "K" was not permanently incapacitated runs counter to the weight of the evidence.

82. On review, Ms. "K"'s treating psychiatrist supported her application for review with the assertion that her conditions are "... permanent in that they not only incapacitate her from performing tasks that the IMF might reasonably ask of her, but from performing a job anywhere else." (Treating psychiatrist's report of June 15, 2001.) In contrast, the reviewing psychiatrist concluded "... this patient would be periodically hampered from performing adequately in the workplace, but not permanently." (Reviewing psychiatrist's report of August 25, 2001.) In his final report to the Administration Committee, the Medical Advisor

did not opine specifically on the likely permanency of Applicant's condition, instead citing his agreement with the reviewing psychiatrist that Ms. "K" is "capable of performing her job functions" and hence was not totally disabled. (Medical Advisor's report of April 25, 2002.)

83. The deliberations of the Administration Committee on review and the litigation in the Administrative Tribunal have focused the issue of permanency on a factual dispute as to whether Applicant has been reasonably compliant or not with prescribed treatment regimens. Respondent contends that Applicant has been insufficiently committed to a treatment program that would control her symptoms and, as her thinking is not disordered, that she could choose to comply with such a program. Applicant asserts that she "... has attempted at every opportunity to alleviate her condition" by undergoing psychotherapy and taking prescribed medications, cooperating with the treatment regimens of her treating physicians.

84. The Final Minutes of the Administration Committee reflect that the Committee based its decision on review in part on the view that Applicant was not compliant with prescribed treatment:

> "... [The Medical Advisor] ... noted that the participant frequently changes physicians and does not fully comply with prescribed medical regimes. ... Treatment is difficult because the participant can but does not comply with the treatment regimes. ...
>
> ....
>
> .... It was not clear why the person stopped taking medication."

(Administration Committee Final Minutes, May 9, 2002.) The Committee also noted in its discussion that while the Plan cannot require a participant to take medication or undergo surgery, it was not required to grant a disability pension to an individual who "refuses treatment." (Id.)

85. Moreover, the Medical Advisor identified as the "key to determining incapacity in this instance" as "... whether there is a volitional problem as with thought disorders where the person has no choice because they are confused, disoriented or delusional." (Id.) The Medical Advisor concluded that:

> "In this case, the person's thinking is not disordered and they do have a choice to comply or not to comply with a treatment regime which could help her. ... She could follow a treatment regime by taking prescription drugs to control her behavior. There is no reason in the record why she cannot do so."

(Id.) At the same time, the Medical Advisor "... further elaborated that the participant's condition reflected poor impulse control." (Id.)

86. With regard to the factual dispute as to Ms. "K"'s compliance or not with the treatment options offered by her physicians, the record before the Tribunal appears to be lacking in evidentiary support for any of the following findings: a) that Ms. "K" was noncompliant with prescribed treatment, b) that she frequently changes physicians, or c) that she had stopped taking medication. The record review by the reviewing psychiatrist would seem instead to confirm that Ms. "K" had availed herself of treatment options for her multiple psychiatric conditions. The medical records show that she had been under psychiatric care and had been prescribed numerous medications over the years. While it is not possible to know whether Applicant was fully compliant, for example, in taking prescribed medications, there are no notations in the records that she was not. In fact, the Medical Advisor's own final report to the Administration Committee stated that "[m]edication had controlled the depressive aspects of this mental condition [i.e. borderline personality disorder]." (Medical Advisor's report of April 25, 2002.) As to the specific contention that Ms. "K" had frequently changed physicians, it may be observed that the reviewing psychiatrist's November 11, 2001 review of the records of the treating psychiatrist revealed that Ms. "K" had remained under the treatment of that physician for more than a year. (Reviewing psychiatrist's report of November 11, 2001.)

87. As noted earlier, the Medical Advisor expressed the view in his initial report that Ms. "K" had not undertaken psychotherapy of sufficient intensity or frequency to treat her mental condition:

> "She has never undergone long-term psychotherapy. Although her recent therapy has been supportive, it has not been of sufficient intensity and frequency to treat her character disorder. She has not been motivated to attempt individual intensive therapy, tending to focus instead on activities which enable her to avoid distress."

(Medical Advisor's report of January 26, 2001.) This conclusion is not tantamount, however, to a finding that Ms. "K" had been "noncompliant" in pursuing treatment of her condition.

88. An important question presented by this case is the extent to which Applicant's alleged "noncompliance" with treatment, if, in fact, there has been such noncompliance, may be attributable to the effects of the condition itself. Interestingly, in the same portion of the Administration Committee's discussion in which the Medical Advisor expressed the view that Applicant's alleged failure to comply with treatment was a matter of volition and that she could follow a treatment program, he "further elaborated" that Ms. "K"'s "... condition reflected poor impulse control." (Administration Committee Final Minutes, May 9, 2002.) Similarly, in his initial report, the Medical Advisor had noted: "Although intensive therapy would be expected to lessen the negative consequences of her characterologic disorder; *given her personality type*, she is unlikely to substantially commit herself to long-term intensive psychotherapy." (Medical Advisor's report of January 26, 2001.) (Emphasis supplied.) Regarding Ms. "K"'s cognitive state, the reviewing psychiatrist had noted that it is "... probably overwhelmed at times by her moods and emotions." (Reviewing psychiatrist's

report of August 25, 2001.) Accordingly, it is possible that Applicant's mental disorder may itself have impeded its treatment.

89. In the view of the Administrative Tribunal, there is insufficient support in the record for the conclusion that Applicant did not comply with prescribed treatment regimes; moreover, if there were basis for a finding of noncompliance, it is possible that such noncompliance would be regarded as "reasonable" given the nature of Applicant's illness.

90. The WBAT addressed the issue of alleged noncompliance with treatment options in the Shenouda case, in which the Applicant had been diagnosed with fibromyalgia. In that case, the Bank had contended that "...any failure on the part of the Applicant to improve in health is primarily attributable to her unreasonable failure to take recommended medications, exercise and therapy." (Para. 25.) The WBAT concluded that these assertions were "clearly contradicted by the record," (Id.) as the evidence showed that physical therapy was not likely to improve the individual's condition and that any failure to use prescribed medications was attributable to the adverse side effects they produced. (Paras. 26-27, 30.) The WBAT also noted physician reports of the applicant's "severe" impairment, as well as the recent deterioration of her condition, concluding that "it was much more likely than not that this disability would be permanent." (Paras. 28-30.)

91. Ms. "K" additionally contends that within the context of her remaining working life she is totally and permanently incapacitated, although a younger person might not be so classified. Respondent contends that at age 52 (Ms. "K"'s age at the time of the Administration Committee's decision on review), Applicant has approximately thirteen years of remaining working life until reaching the Fund's mandatory retirement age of 65 and that she has not shown that this is insufficient time for treatment of her personality disorder.

92. The WBAT has recognized that age may be a consideration in determining permanent incapacity under the parallel provision of the Bank's pension plan. In Shenouda, para. 33, the WBAT held that determination of whether total incapacity is "likely to be permanent" is to be made "in relation to the normal retirement age" of 62 under the Plan.[19] In Shenouda, the applicant was 57 at the time that her application for disability retirement had been rejected; she had been, at that time, fully disabled for more than two and one-half years. The WBAT decided, under all of the circumstances, that there was no reasonable basis to conclude that the applicant's condition would improve in the following five years. In this case, Ms. "K"'s proximity to her normal retirement date (defined by SRP Section 4.3(f) for purposes of disability retirement as age 65)[20] is a factor to be considered in determining whether her incapacity is likely to be permanent.

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[19] The WBAT's rationale was that, as is the case under the Fund's SRP, disability retirees under the Bank's Plan are subject to periodic reassessment up until normal retirement age. (Shenouda, para. 33.)

[20] For purposes other than disability retirement, "normal retirement date" is defined under the Fund's Plan as age 62. (SRP Section 1.1(k).)

93. Finally, any treatment options and prospects for improvement naturally must be evaluated in the context of the seriousness of the illness and the length of its duration. In A, the WBAT considered a case in which the dispute between the parties was not as to the existence of the applicant's incapacity but whether the incapacity was likely to be permanent. The Medical Advisor's opinion was that treatment would restore the applicant's work capability and that she therefore was not "permanently" incapacitated. The WBAT reversed the PBAC's decision (which was based on the Medical Advisor's conclusion) because the medical records showed that the applicant suffered from a severe and long-standing psychiatric condition:

> "In the view of the Tribunal, the PBAC's conclusions cannot be sustained in the light of the said Medical Reports, particularly in the following respects:
>
> (i) They fail to take sufficient account of the fact that the Applicant had suffered from severe depression since childhood. In 1992, Dr. X concluded that she had a 'severe psychiatric condition.' The underlying cause of the Applicant's illness is a long-standing one and the Medical Reports do not show that this problem has been eradicated or improved by treatment.
>
> ...."

(Para. 16.) Accordingly, the WBAT concluded:

> "In light of such a long history of severe depression and psychological disorders, which seemed to have deteriorated with the years, the Applicant may be regarded as totally incapacitated for the performance of any duty with the Bank which she might reasonably be called upon to perform and such incapacity is 'likely to be permanent.'"

(Para. 17.) In holding that the incapacity was "likely to be permanent," the WBAT further suggested that the determination is to be made in light of the provision of the World Bank's pension plan, parallel to the Fund's SRP, authorizing the periodic reassessment of disability retirees:

> "…Section 3.4(a) does not say that incapacity must be permanent but only 'likely' to be permanent. The test is confirmed by Section 3.4(d) of the Staff Retirement Plan which empowers the Bank to terminate the disability pension on medical examination or other satisfactory evidence that the incapacity of a retired participant has

> wholly ceased or that he or she has regained the earning capacity which he or she had before the disability."

(Para. 17.)

94. In the case of Ms. "K", there is evidence in the record that Applicant's condition is of a long-standing character. The Medical Advisor in his initial report had noted a history of depressive episodes, the treating psychiatrist dated these as extending over the preceding six years, and Ms. "K" had recounted to another physician that she had been depressed most of her life, although "usually not 'badly'." Moreover, the reviewing psychiatrist made clear that Applicant's "... psychiatric symptoms emanate from biologic, developmental characterologic constructs endemic to her personality and neurochemistry." (Reviewing psychiatrist's report of September 5, 2001.) Similarly, the Final Minutes reflect that the Medical Advisor told the Administration Committee during its discussion that "... the records indicate that this condition existed at an early developmental period in the participant's life and that ... the condition ... develops over a person's life time." (Administration Committee Final Minutes, May 9, 2002.) Moreover, it may be observed that while the Medical Advisor in his reports faulted Applicant for not undertaking "intensive" psychotherapy, he also held out only limited hope for its efficacy, noting that it would be expected to "lessen" the negative consequences that her personality disorder has upon her workplace functioning. (Medical Advisor's reports of January 26, 2001 and April 25, 2002.)

95. The immediate question for decision is whether Applicant's incapacity is the result of a long-standing, intractable condition for which she has reasonably but unsuccessfully attempted treatment and hence is "likely to be permanent" or whether the conclusion of the Administration Committee may be sustained that "... since her condition can be controlled with prescription drugs even though there is expected to be recidivism, she is not permanently disabled." (Administration Committee Final Minutes, May 9, 2002.) In the Tribunal's view, the Applicant's incapacity is "likely to be permanent" for the reasons indicated above.

Was the Administration Committee's Decision Taken in Accordance with Fair and Reasonable Procedures?

96. In addition to seeking reversal of the Administration Committee's decision on the basis that the Committee erred in its interpretation and application of the requirements of the Staff Retirement Plan to the facts of her case, Ms. "K" seeks to impugn the fairness of the procedures by which the decision was taken. As considered *supra*, the question of whether the Administration Committee's decision has been taken in accordance with fair and reasonable procedures is one of the elements of the standard of review to be applied by this Tribunal to decisions of the SRP Administration Committee on disability retirement. The World Bank Administrative Tribunal has held that "…a decision by the PBAC may also be overruled, among other reasons, if the requirements of due process are not observed." (Shenouda, para. 36.)

97. Moreover, the IMFAT's authority to review the procedural fairness of any decision contested therein is found in the requirement of Article III, second sentence, that it apply "…the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." The significance of fair process as a general principle of international administrative law is highlighted by the Statutory Commentary:

> "…certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund."

(Report of the Executive Board, p. 18.)

98. Applying this principle in Ms. "C", the Tribunal awarded compensation for procedural deficiency while sustaining the contested decision, the non-conversion of the applicant's appointment from fixed-term to regular staff. (Para. 44.) The Tribunal concluded that it was a "lapse in due process" for the applicant not to have been afforded a meaningful opportunity to rebut adverse evidence regarding her performance. (Paras. 41-42.) The Tribunal further observed that "…adequate warning and notice are requirements of due process because they are a necessary a prerequisite to defense and rebuttal," (para. 37), citing Safavi v. The Secretary General of the United Nations, UNAT Judgment No. 465, paras. VI-VIII (1989). *See also* Mr. "A", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-1 (August 12, 1999), para. 94. The principle of *audi alteram partem* was invoked more recently by this Tribunal in Mr. "P" (No. 2), para. 152, in which it reaffirmed that "…the Fund's internal law favors legal decisions that are the result of adversary proceedings, in which reasonable notice and the opportunity to be heard are the essential elements."

99. The case of Ms. "K" raises the important issue of what process is due to applicants for disability retirement under the SRP, whether the Rules of Procedure of the Administration Committee comport with the requirements of international administrative law, whether the Rules have been followed in her case, as well as whether there are any other practices or procedures of the Administration Committee evidenced in this case that call into question the procedural fairness of the decision-making process.

100. In considering the procedural rights of applicants for disability retirement, it is to be borne in mind that a retirement pension (whether for disability or otherwise) is not merely a "benefit" conferred by the Fund on its staff. The pension Plan is a joint insurance scheme. While the Fund contributes substantially to the Plan and is responsible for its administration, the SRP participant likewise makes regular and significant contributions from earnings over the course of a career to ensure his entitlement, as authorized by the terms of the Plan, to income replacement at early retirement, normal retirement or in the event that he becomes

totally and permanently incapacitated. Accordingly, the applicant's stake in the outcome of the decision-making process deserves a high level of procedural protection. The Committee itself may be regarded as representing the Plan's other stakeholders, protecting the assets of the Plan in the interests of the other participants similarly entitled to the Plan's benefits and of the Fund as a major contributor to those assets. That the process for deciding on applications be a fair and reasonable one is an interest shared by all Plan participants and the organization.

101. The World Bank Administrative Tribunal has had occasion to comment on the application of principles of fair procedure and transparent decision making in the context of its review of disability retirement decisions:

> "The Tribunal notes, *inter alia* that: the PBAC does not give the reasons for rejecting an application for disability pension; the opinion of the Medical Advisor is normally not made available to the applicant (at least before the deliberations of the PBAC); a representative of the applicant is not entitled to participate in the proceedings; the PBAC's decision-making and approval of benefits is excessively tied to the opinion of the Medical Advisor; there is apparent reluctance to utilize independent medical experts in the pertinent field; and there is great uncertainty as to the meaning of a disability to do Bank-related work, especially in light of the Bank's reference in its pleadings to the possibility of a staff member's performing assignments at home during very brief, flexibly scheduled work periods. These are all elements that can readily interfere with due process and with the transparency of decision-making by the Bank."

(Shenouda, para. 37.) It may be observed that some of the same concerns regarding procedural fairness raised by the WBAT are the subject of controversy in the present case.

102. Ms. "K"'s procedural arguments may be summarized as follows. The Administration Committee's decision was procedurally defective because "[t]he information provided the Committee excluded applicant's [i]nformation in its entirety"; the medical experts were not jointly selected to be truly "independent"; and the Committee considered a hearsay report of the findings of one of the reviewing physicians.

103. For its part, Respondent maintains that the terms of the SRP clearly contemplate that the Administration Committee's decision must be based on, and consistent with, the expert advice of its Medical Advisor. The Administration Committee acted appropriately in considering the opinions of both reviewing and treating physicians. That the underlying records of the treating physicians are not provided to Committee members does not represent a failure of process because the records are of a sensitive nature and the Committee members do not have the expertise to evaluate them. Applicant has not shown any bias on the part of the reviewing physicians or that it was improper for the Committee to accept a summary by

external counsel of the report of the infectious disease specialist. Applicant has not shown that the Committee failed to take into account any material information that would have affected its decision.

104. It may be observed that Rule VI of the Administration Committee's Rules of Procedure appears to give the Committee considerable discretion to "…inquire about all information it needs for an equitable consideration of a Request," including the possibility of holding oral hearings with cross-examination. Rule VI provides in its entirety:

"**RULE VI**

Proceedings

> 1. The Committee will inquire about all information it needs for an equitable consideration of a Request. In considering a Request, the Committee may rely on written submissions or it may decide to convene an oral hearing, and decide who may attend such hearing. The Secretary will provide the Requestor with reasonable notice of the date of any proceeding in the matter, except in the circumstances described in Rule II, paragraph 5.
>
> 2. Upon request by the Requestor or upon its own initiative, the Committee may determine that any oral hearing or the evidence presented shall be confidential and the extent and modalities of such confidentiality. Any non-confidential information relied on by the Committee shall be subject to review and discussion, including cross-examination in the case of oral testimony. In the event that the Committee recognizes the confidentiality of any evidence, and a waiver of confidentiality cannot be obtained, then the Requestor shall be given an opportunity to review and respond to a summary of that evidence which shall be prepared by the Secretary.
>
> 3. The Requestor and any other party may be represented by counsel, each at his own expense.
>
> 4. The deliberations of the Committee shall be treated as confidential. Unless the Committee decides otherwise, the minutes of its deliberations shall be confidential and shall not be made available to the Requestor or any other party."

There is room to question whether the Administration Committee's implementation of this Rule in the case of Ms. "K" afforded Applicant sufficient and timely opportunity for rebuttal.

105. Rule VII, para. 1 of the Administration Committee's Rules of Procedure requires:

> "Each Decision shall be in writing, stating the reasons on which it is based and any action that the Committee may take or recommend."

In the case of Ms. "K", the Committee's initial Decision denying her application for disability retirement did not set forth any reasons for the Decision. Instead, it simply recited the standard for disability retirement and announced that the Committee had concluded that she did not meet that standard. This lapse in process not only appears to be in violation of the text of the Rule[21] but also has the effect of denying Applicant an opportunity for meaningful response.

106. It may be further noted that para. 3 of the same Rule provides:

> "Upon request, the Secretary of the Committee will furnish to the Requestor copies of any non-confidential documents and a summary, prepared by the Secretary, of confidential evidence that it considered in making its decision."

Ms. "K" apparently did not avail herself of this opportunity. Nonetheless, as the proceedings in the case of Ms. "J" demonstrate, such rebuttal may be of only limited significance, as it does not provide any opportunity for the applicant to review and respond to the evidence prior to the taking of the Administration Committee's Decision. The question therefore arises whether the Administration Committee's procedures afford an applicant reasonable notice and opportunity to be heard.

107. Another procedural matter of concern evident in Ms. "K"'s case, although not specifically raised by Applicant, is the role played by external counsel during the Administration Committee's deliberations on review. The Final Minutes indicate: "The Chair asked if this condition would be considered disabling by the Plans of other organizations, to which external counsel replied that it would not be considered disabling." The question arises whether this comment, a generalization for which no basis is supplied, may have improperly influenced the Committee's decision-making process.

108. The Tribunal has decided Ms. "K"'s application in her favor on substantive grounds. In this case, the Tribunal finds no need to pass upon her procedural complaints. But it observes for the future guidance of the Administration Committee that the Committee may wish to consider the following points.

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[21] International administrative tribunals have emphasized the importance of observance by an organization of its procedural rules. *See* D'Aoust, para. 23; Ms. "Y"(No. 2), para. 55.

109. The Administration Committee may consider enabling an applicant to submit observations in a current and timely way upon any medical reports and opinions submitted to or rendered by the Medical Advisor in the case.

110. Since in the Tribunal's view the applicant is entitled to see and comment upon all medical reports and opinions submitted to or rendered by the Medical Advisor in the case, the members of the Administration Committee should be entitled themselves to review those medical reports, with the object of weighing fully the views of both treating and reviewing physicians and evaluating the conclusions of the Medical Advisor.

111. Additionally, there might be room for consideration by the Administration Committee of review of an Applicant's condition, and opinions relating to it, not by a single Medical Advisor but by a Board of Medical Advisors, as in other international organizations such as the ILO and UNESCO. One member would be designated by the Applicant, a second by the Administration Committee, and the third by agreement between the two so designated. The Tribunal observes that this tripartite model of medical evaluation already is embodied in the Fund's internal law in cases of medical separation at the Fund's initiative.[22]

112. A further consideration that may be borne in mind by the Administration Committee is that the advice of the Medical Advisor (or of any Board of Medical Advisors) should be confined to medical questions and not extend to the ultimate conclusion of whether the applicant is, or is not, totally and permanently incapacitated for the performance of any duty which the Fund may reasonably call upon him to perform. Rather, the drawing of that conclusion should be the function of the Administration Committee.

113. Finally, the applicant should be permitted to comment upon any statements of Fund officers regarding the applicant's capacity to perform any particular duty that the Fund might maintain that he or she might reasonably be called upon to perform.

Remedies

114. In her pleadings, Applicant seeks as relief a) that the Tribunal order that she be granted a disability pension retroactively; b) that "all funds deducted from her service accounts be recredited";[23] and c) legal costs.

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[22] GAO No. 13, Rev. 5 (June 15, 1989), Annex I provides in pertinent part:

> "2.03.1 A panel of medical experts shall be constituted in the following way: the Director of Administration and the staff member shall each appoint a panel member, and a third panel member shall be selected jointly by the first two members. ..."

See *supra*, The Legal Framework, Separation of a Staff Member for Medical Disability.

[23] Respondent has answered that no credits have been deducted from any accounts of Applicant and that Applicant has not elaborated what credits she believes should be restored.

115. The Tribunal's remedial authority is provided by Article XIV of the Statute, which states in its entirety:

> ***"ARTICLE XIV***
>
> 1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.
>
> 2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.
>
> 3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.
>
> 4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.
>
> 5. When a procedure prescribed in the rules of the Fund for the taking of a decision has not been observed, the Tribunal may, at the request of the Managing Director, adjourn the proceedings for institution of the required procedure or for adoption of appropriate corrective measures, for which the Tribunal shall establish a time certain."

116. In exercise of the foregoing authority, the Tribunal decides that the decision of the Administration Committee denying a disability pension to Ms. "K" shall be rescinded and orders that the disability pension be granted.

117. Since the Tribunal has felt it unnecessary to pass upon the Applicant's claim of procedural unfairness, it awards no separate compensation to the Applicant in this regard.

118. As to Applicant's request for legal costs, it is noted, consistent with Section 4 of Article XIV, that if the Tribunal concludes that the application is "well-founded in whole or in part," reasonable legal costs may be awarded "... taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates." In the case of Ms. "C", the Tribunal awarded partial costs, taking account of the submissions of the parties, the Statutory criteria, and the limited degree to which the applicant in that case was successful in comparison with her total claims. (Assessment of compensable legal costs pursuant to Judgment No. 1997-1, IMFAT Order No. 1998-1 (December 18, 1998).)

119. The Tribunal has found Ms. "K"'s Application on the merits to be well-founded. Accordingly, pursuant to Article XIV, Section 4 of the Statute, the Fund shall pay Applicant the reasonable costs of her legal representation. The Tribunal will assess the amount of such compensable legal costs following the submission of a statement of costs by Applicant and an opportunity for comment by the Fund, according to a schedule to be transmitted with this Judgment.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

1. The decision of the Administration Committee denying Applicant a disability pension is rescinded and it is ordered that a disability pension be granted to Ms. "K", retroactive to the date of Applicant's retirement.

2. The Fund shall pay Applicant the reasonable costs of her legal representation, in an amount to be assessed by the Tribunal following the further submissions of the parties according to the schedule transmitted with this Judgment.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

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Stephen M. Schwebel, President

_____
Celia Goldman, Registrar

Washington, D.C.
September 30, 2003